10-9-2015

State v. Gonzalez Appellant's Brief Dckt. 42883

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. ANTONIO CUELLAR GONZALEZ, Defendant-Appellant.	NO. 42883 ADA COUNTY NO. CR 2014-9087 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Antonio Gonzalez appeals contending the district court erred when it denied his motion for a mistrial. Specifically, he asserts the prosecutor knew there was a high risk that an improper comment regarding his request to talk to an attorney the night of the alleged incident would be elicited by a particular set of her questions while cross-examining him. Those questions would have, at best, resulted in the admission of cumulative evidence. And yet, the prosecutor asked a question which called for, and actually elicited, the offending comment anyway. Mr. Gonzalez asserts that constitutes prosecutorial misconduct, and so, the district court should have granted his motion for mistrial. Therefore, this Court should vacate his judgment of conviction, reverse the order denying the motion for mistrial, and remand this case for further proceedings.

Additionally, Mr. Gonzalez asserts that the district court abused its discretion by not ordering a competency evaluation be removed from the current presentence investigation (*hereinafter*, PSI) materials, as that evaluation had been improperly attached to those materials. While Mr. Gonzalez appreciates that the district court properly refused to consider that information itself, he contends that, under established precedent, the district court needed to redline and/or physically remove that evaluation from the PSI materials as well. As such, this Court should instruct the district court on remand to order the improper evaluation removed from the PSI materials.

Statement of the Facts and Course of Proceedings

Mr. Gonzalez was walking down the street when he was detained by Officer Wayne Anderson. (*See* Tr., p.131, Ls.7-18.)[1] He and other officers were investigating a reported fight, and Mr. Gonzalez matched the description of one of the suspects. (*See* PSI, p.60 (Officer Anderson's police report).)[2] Officer Anderson told Mr. Gonzalez to sit on the curb and asked him about the fight, to which Mr. Gonzalez responded, "[w]hat fight?" (Tr., p.137, Ls.9-11; PSI, p.60; State's Exhibit 30 (audio recording of part of Officer Anderson's encounter with Mr. Gonzalez).)

In response to Mr. Gonzalez's denial of knowledge, Officer Anderson told him, "we're going to hold you here then we're going to find that out. We're going to have someone point you out." (State's Exhibit 30, 0:54-1:16.) The officer then asked if Mr. Anderson wanted to tell him the full story, suggesting that maybe the other person involved had come at him, but Mr. Gonzalez continued to deny knowledge of the fight. (State's Exhibit 30, 1:16-22).) Mr. Gonzalez then told Officer Anderson he wanted an attorney. (Tr., p.329, Ls.9-12; *see* PSI, p.60 (Officer Anderson's report stating "I explained that he was just followed from the Sanctuary by witnesses who observed him hit another male in the head/face with a stick. [Mr.] Gonzalez told me he wanted an attorney."); *but see* Exhibit 30 (indicating there was a little other conversation before

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[1] Although the transcripts in this case are provided in three independently bound and paginated volumes, all references to "Tr." Refer to the volume containing the trial testimony taken on October 21-22, 2014, and the sentencing hearing held on December 10, 2014.

[2] PSI page numbers correspond with the page numbers of the electronic PDF file "Gonzalez 42883 psi." Included in this file are the PSI report and all the documents attached thereto (police reports, presentence evaluations, etc.).

Mr. Gonzalez's request for counsel).[3]) The record does not reveal when or whether officers gave Mr. Gonzalez a *Miranda* warning.[4] (*See generally* R., Tr., PSI.) Mr. Gonzalez was subsequently charged with aggravated battery with the use of a deadly weapon and persistent violator enchantment. (R., pp.42-43, 60-62.)

At his ensuing trial, the prosecutor published the audio recording to the jury during her case-in-chief. (Tr., p.139, L.20 - p.140, L.10.) Mr. Gonzalez then testified on his own behalf, contending that he had acted in self-defense when he struck the alleged victim, Frankie Steele, with a stick. (*See generally* Tr., pp.283-300 (Mr. Gonzalez's direct testimony).) Specifically, he testified that, following a confrontation between them earlier in the evening, Mr. Gonzalez woke to see Mr. Steele approaching him with a knife in hand saying, "I'm going to smash you." (Tr., p.295, L.2 - p.296, L.3.) He grabbed a stick laying nearby, the two engaged, and he knocked Mr. Steele down. (Tr., p.297, L.1 - p.298, L.11.) Then, he walked off.[5] (Tr., p.298, L.21.)

In cross-examining Mr. Gonzalez, the prosecutor engaged in the following line of questioning:

> Q. And you heard the audio and the police asked you about the fight in the alleyway?
>
> A. Yes.
>
> Q. And you said what fight?

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[3] The prosecutor admitted that Exhibit 30 was redacted so it would not include Mr. Gonzalez's request for an attorney. (Tr., p.330, Ls.4-7.) As such, it is not clear from the audio exhibit when Mr. Gonzalez made his request for an attorney.

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[5] Mr. Gonzalez's version of events was contradicted by the testimony of other eyewitness. For example, one witness testified that Mr. Gonzalez struck Mr. Steele without provocation, and the witness did not recall seeing a knife in Mr. Steele's hand. (Tr., p.32, L.20 - p.34, L.2.) Another witness testified the fight involved punches, rather than use of a stick. (Tr., p.96, Ls.8-10.)

A. Yes.

Q. And they asked again about the fight in the alleyway and you say what fight?

A. Yes. I asked for a lawyer. They didn't put that on there.

Q. And you say when the officer asks you, did somebody come at you, man? Does somebody come at you, you don't say that they did?

A. I said I wanted to talk to a lawyer.

[Defense Counsel]: Objection.

(Tr., p.328, L.25 - p.329, L.13.)

The district court took up the objection out of the presence of the jury. (*See* Tr., p.329, Ls.14-18.) Defense counsel contended that the prosecutor had improperly elicited the comments about Mr. Gonzalez's request for an attorney, and so, moved for a mistrial. (Tr., p.330, Ls.14-23; Tr., p.331, L.24 - p.332, L.22.) The prosecutor argued that she had tried to avoid that issue: "He is putting this in. He is choosing to do this, and that is a problem. It is specifically limited. And when we met in chambers and I talked about how I was going to limit that redacted audio so that we did not go there, he is now doing this." (Tr., p.330, Ls.4-7.) She also argued she was not inappropriately eliciting a comment on Mr. Gonzalez's silence because "[h]e's conversing with the officers. He is in a position to tell them, if he wants to, that there was self-defense. He's now making up self-defense that didn't exist before after having the opportunity to look at the report and see that the paramedics take a folding knife out of [Mr. Steele's] pocket." (Tr., p.331, Ls.1-8.)

The district court determined there was nothing it could do to correct the issue as Mr. Gonzalez had volunteered the fact that he had requested a lawyer, but it did caution

counsel to limit further questioning to avoid that area moving forward. (Tr., p.331, Ls.12-23.) It also denied Mr. Gonzalez's motion for mistrial. (Tr., p.333, Ls.12-14.)

The jury subsequently found Mr. Gonzalez guilty as charged. (R., pp.140-41.) Once that verdict was returned, Mr. Gonzalez admitted the persistent violator charge. (*See generally* Tr., pp.391-96.)

At the ensuing sentencing hearing, the district court made note of the fact that an old competency evaluation had been provided with the current PSI materials as an attachment to a PSI report prepared in a prior case. (Tr., p.417, Ls.2-8.) The district court indicated that it had not considered the information in the competency evaluation itself, but was wondering whether it should issue an order instructing the Department of Correction remove that evaluation from the PSI altogether. (Tr., p.417, Ls.8-15.) Ultimately, the district court decided not to issue such an order since the evaluation was part of the old PSI, and that old PSI could only have been corrected at the time it was initially prepared. (Tr., p.418, Ls.7-17.) It proceeded to impose a unified sentence of life on, with twenty years fixed upon Mr. Gonzalez. (Tr., p.440, Ls.14-17; R., pp.156-59.) Mr. Gonzalez filed a notice of appeal timely from the Judgment of Conviction. (R., pp.167-68.)

ISSUES

1. Whether the district court erred in denying Mr. Gonzalez's motion for mistrial.

2. Whether the district court abused its discretion by not ordering a competency evaluation to be removed from the PSI materials.

ARGUMENT

I.

The District Court Erred In Denying Mr. Gonzalez's Motion For Mistrial

The Fifth Amendment to the United States Constitution protects people against self-incrimination. U.S. CONST., amend V; *cf.* IDAHO CONST., art. I, § 13. As part of that right, the person has the right to remain silent and the right to speak to an attorney. *Miranda*, 384 U.S. at 444. As a result of these rights, the prosecutor may not introduce evidence of the defendant's pre-arrest or post-arrest silence for the purpose of inferring an admission of guilt. *See, e.g., State v. Moore*, 131 Idaho 814, 820 (1998); *State v. McMurry*, 143 Idaho 312, 314 (Ct. App. 2006). Similarly, the prosecutor cannot "elicit testimony regarding the defendant's post-arrest silence, whether his purpose was to raise an inference of guilt or to impeach the defendant's trial testimony." *State v. Christiansen*, 144 Idaho 463, 470 (2007) (explaining the ruling in *State v. White*, 97 Idaho 708 (1976)).[6] The reason the prosecutor is limited in this way is, "if a prosecutor is allowed to introduce evidence of silence, **for any purpose**, then the right to remain silent guaranteed in [*Miranda*], becomes so diluted as to be rendered worthless." *White*, 97 Idaho at 714 (emphasis added).

These prohibitions prevent not only direct comments on silence by the prosecutor, but also indirect inferences to the defendant's silence. *See, e.g., McMurry*, 143 Idaho at 314. In fact, since the test is objective, the prosecutor need not even intend to draw an inference of guilt from the defendant's silence. *Id.* If a reasonable

[6] The *Christiansen* Court reaffirmed the rule from *White*, and proceeded to extend that rule from the Fifth Amendment context to the Fourth Amendment context. *Christiansen*, 144 Idaho at 470.

person would conclude there was an inference of guilt in the prosecutor's comments on the defendant's silence, those comments violate the Fifth Amendment. *Id.*

Such improper inferences can also arise if the prosecutor elicits comments on silence while questioning a witness. *See, e.g., State v. Ellington*, 151 Idaho 53, 59-60 (2011). In *Ellington*, the prosecutor asked the detective-witness questions about his investigative process, including a question about whether the detective had interviewed the defendant. *Id.* The officer's answer to that question constituted an improper reference to the defendant's decision to remain silence. *Id.* at 60-61. The Court determined that the there was no reason for the prosecutor to engage in that line of questioning, particularly since the prosecutor "clearly knew the line of questioning would create a high risk of an improper comment on Mr. Ellington's silence." *Id.* at 61. Therefore, it held that asking that question anyway constituted prosecutorial misconduct. *Id.*

As in *Ellington*, the prosecutor in this case knew she was treading dangerous waters by inquiring about Mr. Gonzalez's statements to the police. In responding to defense counsel's objection, the prosecutor admitted, "when we met in chambers and I talked about how I was going to limit that redacted audio so that we did not go there [to Mr. Gonzalez's invocation of his rights] . . . ." (Tr., p.330, Ls.4-7.) The prosecutor was, thus, expressly aware that presenting in this area posed a high risk of an improper comment on Mr. Gonzalez's silence. *Compare Ellington*, 151 Idaho at 61. She also admitted that her purpose in treading those waters was to infer Mr. Gonzalez's guilt from his decision to not talk with the officers: "He's conversing with the officers. He is in a position to tell them, if he wants to, that there was self-defense. He's now making up self-defense that didn't exist before after having the opportunity to look at the report

and see that the paramedics take a folding knife out of [Mr. Steele's] pocket." (Tr., p.331, Ls.1-7.) That is precisely the type of improper substantive inference of guilt from the defendant's silence that the Fifth Amendment protects against. *See, e.g.*, *Moore*, 131 Idaho at 820.

There was no other good reason for the prosecutor to be asking questions in that area. For example, the jury had already heard the audio recording, as well as Officer Anderson's testimony about his detention of Mr. Gonzalez. (*See* Tr., p.137, L.5 - p.141, L.15.) Therefore, asking Mr. Gonzalez about what he said in the audio recording, as the prosecutor did here, would, at best, present cumulative evidence. (*See* Tr., p.328, L.25 - p.329, L.12 (the prosecutor asking "And you heard the audio and the police asked you about the fight in the alleyway? . . . And you said what fight? . . . And they asked again about the fight in the alleyway and you say what fight? . . . And you say when the officer asks you, did somebody come at you, man? Does somebody come at you, you don't say that they did?").) In fact, when the prosecutor tried to ask this same sort of question of Officer Anderson and have him repeat what was said in the audio recording, the district court sustained defense counsel's objection on the basis that it was cumulative evidence. (Tr., p.140, L.24 - p.141, L.4.) Since cumulative evidence is not properly admitted under I.R.E. 403, the prosecutor could not properly seek to admit this evidence for its substance.

Furthermore, it would have been improper for the State to use Mr. Gonzalez's silence to try to impeach his testimony. Officer Anderson had indicated to Mr. Gonzalez from the outset that he was not free to leave the scene. (*See generally* State's Exhibit 30.) Furthermore, Officer Anderson expressly told Mr. Gonzalez that he would be held until other officers brought eyewitnesses to identify him. (State's Exhibit 30, 1:10-1:16;

see generally State's Exhibit 30 (officers' indicating they were sure Mr. Gonzalez was the suspect for whom they were looking).) Thus, Mr. Gonzalez was in custody when the officers asked him whether he had been attacked first. *See, e.g., State v. James*, 148 Idaho 574, 576-77 (2010) ("*Miranda* warnings are required where a suspect is 'in custody,' a fact determined by whether there is a formal arrest or restraint no freedom of movement of the degree associated with a formal arrest.") (internal quotations omitted). As such, *Miranda* warnings were required, and Mr. Gonzalez invocation constituted post-custody silence.[7]

Since Mr. Gonzalez's silence was post-custody, the prosecutor could not validly use Mr. Gonzalez's silence to impeach his testimony. The Idaho Supreme Court has made it clear that the prosecutor's comment on "post-arrest"[8] silence is inappropriate regardless of whether it is for impeachment of a substantive inference of guilt. *Christiansen*, 144 Idaho at 470; *cf. Ellington*, 151 Idaho at 61 (finding misconduct when the prosecutor's questions "dr[e]w attention to Mr. Ellington's post-arrest silence"

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[7] To the extent trial counsel identified this as "pre-arrest" silence, he appears to have been referring to the formal placing of Mr. Gonzalez under arrest. (*See, e.g.*, Tr., p.330, Ls.14-23.) However, as the Idaho Supreme Court has made it clear that formal arrest is not the governing event in terms of the right to silence: "this Court has held that a defendant's right to remain silent attaches upon custody, not arrest or interrogation, and thus, a prosecutor may not use any post-custody silence to infer guilt in its case in chief." *Ellington*, 151 Idaho at 60 (citing *Moore*, 131 Idaho at 820-21); *cf. James*, 148 Idaho at 576-77. There certainly is no tactical reason for trial counsel to have narrowed the scope of his argument in contrast to clear, favorable Supreme Court precedent.

[8] Since the use of post-arrest silence is tied to *Miranda* and the Fifth Amendment, the term "post-arrest" must be referring to post-custody silence, as custody is the moment those rights attach. *See, e.g., Ellington*, 151 Idaho at 60. Were it read otherwise, there would be an irreconcilable and unacceptable gap between putting the defendant in custody and placing him formally under arrest in which the State could freely violate in the protections afforded by the Fifth Amendment and Article I, § 13 of the Idaho Constitution. *Compare Berkemer v. McCarty*, 468 U.S. 420, 441 (1984) (rejecting a rule that *Miranda* warnings only need be given at the moment of formal arrest because doing so "would enable the police to circumvent the constraints on custodial interrogations established by *Miranda*.")

without discussing when or whether *Miranda* warnings had been given). Additionally, this sort of cross-examination – asking whether the defendant could have, but did not, offer a particular explanation at a previous point in time – is specifically impermissible because it will force a defendant to speak at the earlier time, "so as to protect himself from an unfavorable inference from his silence," in violation of the Fifth Amendment to the federal constitution and Article 1, Section 13 of the Idaho Constitution. *State v. Haggard*, 94 Idaho 249, 252 (1971). As such, this area was not a proper area for impeachment by reference to a defendant's silence. Therefore, there was no good reason for the prosecutor to be asking Mr. Gonzalez about his conversation with police, particularly in light of the high risk that such questions would result in an improper inference of guilt based on Mr. Gonzalez's invocation of his rights. *Compare Ellington*, 151 Idaho at 61.

Worse still, once Mr. Gonzalez gave context to his response to the prosecutor's questions by saying that he had asked for a lawyer (Tr., p.329, Ls.5-8), the prosecutor should have known that she was toeing the line demarcated in *Ellington*. Mr. Gonzalez's answer left little doubt that any further inquiry as to why he did not make a full statement to police that night would elicit an improper comment on Mr. Gonzalez's silence, such as, *I did not tell them because I wanted to talk to a lawyer.*[9] The already-high risk of eliciting an inappropriate comment on silence had actually managed to get higher.

And yet, despite knowing of that extremely high risk, the prosecutor decided to proceed with that line of questioning anyway. In fact, her next question practically

[9] The italics in this section are used to promote clarity by denoting a potential statement that could be made, rather than a statement actually made.

required Mr. Gonzalez to give the answer which would violate his rights: "And you say when the officer asks you, did somebody come at you man? Does somebody come at you, **you don't say that they did**?" (Tr., p.329, Ls.9-11 (emphasis added).) There is only answer Mr. Gonzalez could give that would relate any semblance of the full truth to the jury – *I did not say that because I had requested to talk to a lawyer.* And, unsurprisingly, that is the answer he gave: "I said I wanted to talk to a lawyer." (Tr., p.329, L.12.)

Thus, the prosecutor in this case improperly elicited a comment on the defendant's invocation of his rights, just like the prosecutor did in *Ellington*. *Compare Ellington*, 151 Idaho at 61. Therefore, as in *Ellington*, the district court erred by denying the motion for mistrial. *Id.* at 60, 76. That means this Court should vacate Mr. Gonzalez's judgment of conviction and remand this case for a new trial.

II.

The District Court Abused Its Discretion By Not Ordering A Competency Evaluation To Be Removed From The PSI Materials

While the district court properly refused to consider the material contained in the competency evaluation which was erroneously attached to the PSI in this case, it abused its discretion by not redlining and/or ordering that evaluation to be removed from the PSI entirely. The district court misperceived the scope of its discretion vis-à-vis the current PSI, apparently deciding that, because the competency evaluation was included as an attachment to a previously-prepared PSI, which it could not modify, it could not remove that improperly-included competency evaluation from the current PSI. (*See* Tr., p.418, Ls.8-9.) Whether or not it could change the old PSI, the district court certainly retained authority to deal with materials attached to the current PSI, and it had

a duty to ensure improper information was not included in the current PSI. As such, it should have either redlined that evaluation or ordered it removed entirely from, at least, the current PSI.

In order to act within its discretion, the district court must: (1) perceive the issue as one of discretion; (2) act within the outer bounds of that discretion and consistent with the applicable legal standards; and (3) reach its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600 (1989). The district court may also abuse its discretion if it acts without recognizing the full scope of its discretion. *See, e.g., State v. Anderson*, 152 Idaho 21, 22 (Ct. App. 2011).

In regard to information in PSI reports, the district court has the duty to ensure improper or unreliable information is excluded from the report. *See, e.g., State v. Mauro*, 121 Idaho 178, 183 (1991) (finding some of the information in the PSI was potentially unreliable, and so, remanded the case for new sentencing after a PSI with only proper information was prepared). As the district court properly recognized, competency evaluations may not be appropriately included in PSI reports. (*See* Tr., Vol.417, Ls.4-11.) The reason that such evaluations may be improperly considered is that a defendant has certain Fifth Amendment rights which are in play during competency evaluations. *See, e.g., State v. Velasco*, 154 Idaho 534, 536 (Ct. App. 2013). Specifically, the defendant needs to be sufficiently advised by counsel as to the nature of this right as it relates to participating in psychological evaluations. *Estrada v. State*, 143 Idaho 558, 564 (2006); *see also Estelle v. Smith*, 451 U.S. 454, 470 (1981). Only then can the defendant make a knowing, intelligent, and voluntary decision as to whether he wants to waive those protections and participate in the psychological evaluation. *See, e.g., Velasco*, 154 Idaho at 536; *State v. Jockumsen*, 148 Idaho 817,

820 (Ct. App. 2010). Absent such a waiver, the courts cannot rely on the information in the competency evaluation in either the guilt or the penalty phase of the case. *See id.*

In this case, there is no indication that Mr. Gonzalez was informed of his Fifth Amendment rights prior to the competency evaluation. For example, while the evaluation notes that Mr. Gonzalez was told the results of the evaluation would not be confidential, it makes no mention as to whether his constitutional rights were discussed. (*See* PSI, p.327.) Additionally, while Mr. Gonzalez was apparently proceeding *pro se* in the prior case during which the evaluation was conducted, there is no indication the district court engaged in a colloquy with Mr. Gonzalez to assure itself that Mr. Gonzalez had knowingly, intelligently, and voluntarily waived his rights vis-à-vis the competency evaluation. Absent such information, it would be inappropriate, as the district court in the current case recognized, to use that competency evaluation in a subsequent sentencing determination. (*See* Tr., p.417, Ls.4-11.)

However, the fact that this district court judge did not consider that information itself does not end the inquiry. As the district court indicated, there is also the question of whether that evaluation should continue to be included in the PSI materials at all. (Tr., p.417, Ls.12-14.) However, it is clear that the district court had the authority to remove that information from, at least, the current PSI, and that it should have exercised that authority. *See, e.g., Jockumsen*, 148 Idaho 817. In *Jockumsen*, a competency evaluation was inappropriately attached to the PSI materials and was actually used against the defendant at sentencing. *Id.* at 821. In remanding the case, the Court of Appeals instructed the district court to "cross out the portions of the PSI referencing the competency evaluations in violation of Jockumsen's Fifth Amendment right against self-

incrimination, **detach the competency evaluations from the PSI, and forward a corrected copy to the Department of Correction**." *Id.* at 823 n.3 (emphasis added).

The *Jockumsen* Court explained the reason the district court needed to take those steps is that "'[t]he use of a PSI does not end with the defendant's sentencing." *Id.* (quoting *State v. Rodriguez*, 132 Idaho 261, 262 n.1 (Ct. App. 1998)). As the Court of Appeals explained in *Rodriguez*, "[t]he report goes to the Department of Correction[] and may be considered by the Commission of Pardons and Parole in evaluating the defendant's suitability for parole." *Rodriguez*, 132 Idaho at 262 n.1. Similarly, "if the defendant reoffends, any prior PSI is usually presented to the sentencing court with an update from the presentence investigator," *id.*, as happened in Mr. Gonzalez's case. Thus, "a PSI follows a defendant indefinitely." *Rodriguez*, 132 Idaho at 262 n.1. As a result, "information inappropriately included therein may prejudice the defendant even if the initial sentencing court disregarded such information." *Id.*; *cf. Jockumsen*, 148 Idaho at 823 n.3. Therefore, the "*better procedure* [is] 'redlining' of the report, in which the court physically notes which portions are to be excluded," *Rodriguez* , 132 Idaho at 262 n.1 (emphasis from original). In the case of improperly attached reports, that is better accomplished by completely removing the improperly attached report. *Jockumsen*, 148 Idaho at 823 n.3.

Thus, the rule in this regard is clear: "it [is] insufficient to simply disregard the information at sentencing and, instead, the court should also redline it from the PSI so that this information could not prejudice the defendant in the future." *State v. Carey*, 152 Idaho 720, 722 (Ct. App. 2010); *cf. Jockumsen*, 148 Idaho at 823 n.3; *State v. Molen*, 148 Idaho 950, 961-62 (Ct. App. 2010); *Rodriguez*, 132 Idaho 262 n.1. Therefore, while it is laudable that the district court recognized it should not consider the

competency evaluation included in the PSI itself, it abused its discretion by not ordering that evaluation be removed from the current PSI entirely.

The fact that the competency evaluation was included in the current PSI as an attachment to a prior PSI does not change this analysis. The district court in this case is still tasked with ensuring that the PSI it is using contains only appropriate information. Therefore, when, as here, an inappropriate evaluation is included in the current PSI materials, the district court should have it removed from, at least, the current PSI materials so as to prevent Mr. Gonzalez being prejudiced from this point forward.

And even if the district court cannot order modification of the old PSI itself, removing that evaluation and redlining any references to it in the current PSI will help highlight the issue, should some future court or Department of Correction board be presented with both the prior PSI and the current PSI in the future. In doing so, the risk that those future entities will erroneously rely on the competency evaluation, and so, violate Mr. Gonzalez's rights, is reduced. *See, e.g., Rodriguez*, 132 Idaho at 262 n.1 (explaining the reason for the redline rule is to prevent future harm as the courts are best able). Therefore, the district court abused its discretion by not redlining and/or removing the erroneously-included competency evaluation from, at least, the current PSI materials.

CONCLUSION

Mr. Gonzalez respectfully requests this Court vacate his judgment of conviction and remand this case for a new trial. He also requests that this Court instruct the district court on remand to order the competency evaluation stricken from his PSI information.

DATED this 9th day of October, 2015.

for BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9th day of October, 2015, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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